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Honorable H. Russell Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re: the EXXON VALDEZ	Case No. A89-095 Civil (Consolidated)
THIS DOCUMENT RELATES TO ALL CLASS ACTIONS	

(P1, P3, P8-P12, P13-P15, P16-P18, P22, P24-P28, P40-P41, P42, P43-P44, P65-P67, P77, P112, P139-P144, P145, P146-P147, P189, P195-P196, P202-P206, P225, P246-P247, P267)

SUPPLEMENTAL MEMORANDUM OF IDENTIFIED PLAINTIFFS REGARDING QUESTION 2 IN ORDER NO. 23 DATED MARCH 1, 1990

Class Action Plaintiffs identified above respectfully submit as on Appendix hereto a copy of such Plaintiffs' Reply Memorandum in Support of Motion For Certification of Mandatory Punitive Damages Class filed only in the companion Superior Court action (Exxon Valdez Oil Spill Litigation, Case No. 3AN-89-2533 Civil (Consolidated)). In the Court's March 1, 1990 ORDER NO. 23, the court specifically asked ". . . what would the practical effects

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Class Action Plaintiffs respectfully submit this Reply Memorandum in support of their request for certification of a mandatory punitive damages class.

I.

INTRODUCTION

There is a compelling need for a mandatory punitive damage class. If seriatim punitive damage trials are permitted, claimants whose claims have not yet been tried are at risk that awards will be diminished or disallowed in later trials because of the earlier verdicts, rendering an equitable distribution of punitive recoveries impossible. E.g., In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983), mandamus denied sub nom., In re Diamond Shamrock Chem. Co., 725 F.2d 858 (2d Cir. 1987), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied, 465 U.S. 1087 (1984); Barefield v. Chevron, U.S.A., Inc., 48 Fair Empl. Prac. Cas. (BNA), 1988 U.S. Dist. LEXIS (N.D. Cal. 1988).

Furthermore, a mandatory class would greatly facilitate settlement efforts. Given the potentially enormous size of individual punitive damage verdicts, a relatively small number of opt-outs from a non-mandatory class could impede and jeopardize settlement efforts by refusing to participate unless they receive an unduly large portion of the settlement fund. See discussion in Rosenberg, Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master, 69 Boston Univ.L.Rev. 695, 716 (1989). Unless the Court structures this

litigation in a manner which will eliminate the incentive and ability to engage in such tactics, the class members' interest in obtaining a large global settlement will be substantially impaired, as will the interest of the judicial system in bringing this massive litigation to a fair, rational, and reasonably expeditious conclusion.

Plaintiffs have carefully considered the arguments which have been made against the proposed mandatory class. In an effort to alleviate some of the concerns expressed, plaintiffs have revised the class definition. The proposed class now includes the following:

(a) All members of any class certified in this litigation under Rule 23(b)(3) who do not opt out;

(b) All opt-outs who file individual claims in any Court in Alaska;* and

(c) All other persons or entities who file suit in any Court in Alaska seeking punitive damages in connection with the oil spill.

Under the revised definition, the mandatory class would include anyone who is likely to have a significant punitive damage claim. At the same time, the class is limited to persons who have consented to jurisdiction in Alaska by failing to opt out or by affirmatively bringing suit in Alaska, thereby assuring full compliance with due process requirements

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*"Any Court in Alaska" includes any federal or state Court.

as set forth in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

The Rule 23(b)(3) notice would also provide information concerning the mandatory punitive damage class. Plaintiffs would provide that notice to all reasonably identifiable persons or entities who are members of the Rule 23(b)(3) class, or who have filed suit in Alaska.

Plaintiffs further propose that the representatives of the mandatory class would include, in addition to the representatives of the Rule 23(b)(3) classes, all parties represented by members of the Plaintiffs' Coordinating Committee. Under this proposal, every significant interest that has brought suit would be represented. There could be no question that this group of representatives satisfies the typicality and adequacy requirements of Rule 23(a).

Those plaintiffs objecting to a mandatory class contend that they are entitled to maintain total control of their own punitive damage claims. This ignores the clear purpose of punitive damages, which is not to compensate the individual plaintiffs, but to protect society through deterrence, and to punish the defendant. During the allocation process, each claimant will have a full opportunity to have his own lawyer represent his interests. At that stage, when an aggregate punitive damage fund has been developed through trial or settlement, each claimant can present his own individual argument concerning the share of the global fund to which he is entitled.

The special circumstances of this case make it uniquely suited to the mandatory punitive class action mechanism. There are a large number of claimants in a single geographic arena, arising out of one incident which occurred in Alaska. All known claims are pending before this Court or the United States District Court in Anchorage. Therefore, the Court is in a unique position to assert its authority over the universe of known claims, applying one uniform body of Alaskan law, and is in an excellent position to assess the overall impact of this litigation on the Court system.

In light of the size and complexity of this litigation, firm control is vital. Otherwise, the opportunity to obtain punitive damages will be substantially impaired by inability to get to trial in a timely fashion, if ever. Moreover, repeated adjudications of the same factual issues would severely burden the court system and could conceivably violate defendants' due process rights. See, e.g., Browning-Ferris Indus. v. Kelco Disposal, Inc., ___ U.S. ___, 109 S.Ct. 2909 (1989).

A mandatory class is supported by a further, very practical, consideration. Plaintiffs are litigating against some of the largest companies in the world. Those companies will spare no expense or effort to win this fight. They are bitterly engaged in a war of attrition aimed at discouraging and delaying the prosecution of claims, and at making this litigation so painful and expensive that class members will be willing to resolve their claims for a relatively small amount.

Class counsel will have to advance millions of dollars worth of time and out-of-pocket costs if they are to wage this battle vigorously and effectively. Unless these proceedings can be organized and managed in a way which makes it possible to litigate in a unified manner on behalf of the full class, the expenditures required of class counsel would be unreasonable for the risk involved.

For the reasons set forth in this memorandum, certification of a mandatory class is the only means to achieve a unified punitive damage award that would protect the interests of the plaintiffs and defendants. In addition, it would strongly further public policy by increasing the odds of a shared victory through settlement.

II.

ARGUMENT

The proposed mandatory punitive damage class satisfies the requirements of Alaska Rule 23. First, it easily meets the prerequisites of Rule 23(a): numerosity, commonality of factual and legal questions, typicality of claims, and adequacy of representation. Second, it qualifies for 23(b)(1)(B) certification, and in fact, must be certified as a mandatory class, because allowing separate actions by members of the class would create the "risk" that early "adjudications . . . would, as a practical matter be dispositive of" or would "substantially impair" the interests of the members who are not parties to the adjudications. Alaska R. Civ. P. 23(b)(1)(B).

Although defendants apparently have sufficient assets to satisfy all potential punitive damage awards,* the total individual punitive damage awards may well, at some point, exceed the constitutional due process limitation or the "implied-in-law overkill" limitation on defendants' punishment. Moreover, multiple adjudications of the punitive damage claims could prompt juries to reduce awards or to decline to award punitive damages at all, believing that the defendants had been sufficiently punished by previous awards -- the "limited generosity" phenomenon.

These concerns persuaded Chief Judge Weinstein to certify a 23(b)(1)(B) mandatory punitive damage class despite

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*This, of course, assumes that plaintiffs are not limited by the application of federal preemption to recoveries of statutory funds which would be inadequate to cover all claims.

The opponents to certification argue that no Rule 23(b)(1)(B) class may be certified absent the finding of a "limited fund." However, Rule 23(b)(1)(B) requires only that there be a "risk" of impairment, not that impairment be conclusively determined. The Ninth Circuit has held that certification of a 23(b)(1) class in mass tort cases is only appropriate where separate actions will "inescapably" impair class members claims. See In re Northern Dist. of Cal., Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847, 851 (9th Cir. 1982), cert. denied sub nom., A.H. Robins, Co. v. Abed, 459 U.S. 1171 (1983). While we believe that separate actions will "inescapably" impair class members' interests in the present situation, this standard is more rigid than the Rule requires. See In Re A.H. Robins, 880 F.2d 709, 740 (4th Cir. 1989); "Agent Orange", 100 F.R.D. at 726 ("the stricter Ninth Circuit standard flies in the face of the language of Rule 23"); In Re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 713 (E.D. Mich. 1985) ("[t]he standard set by the Ninth Circuit . . . is much more stringent than the Rule itself requires"). In addition, in the Dalkon Shield case, the Ninth Circuit's decertification was based largely on a fact not present in the instant case: no plaintiffs or defendants supported certification. See "Agent Orange", 100 F.R.D. at 726 (discussing Dalkon Shield).

the absence of a limited fund in Agent Orange, 100 F.R.D. at 727-28. The same concerns apply here.

(a) Certification Of A Mandatory Punitive Damages Class Will Strongly Facilitate Efforts To Obtain A Global Settlement

The law encourages settlements in order to achieve "the avoidance of wasteful litigation and expense." Florida Trailer and Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960). See Williams v. First National Bank, 216 U.S. 582, 595 (1909).

Even aside from the special pressures created by mass tort litigation,

> The fair and effective settlement of civil cases is . . . an important if not essential part of the judicial process in the federal [and state] courts. Without settlements, "the legal system would no doubt career into permanent gridlock."

Settlement Practices in the Second Circuit, Report by the Standing Committee on the Improvement of Civil Litigation, (October 13, 1988,) pp. 1-2.

The need for a viable structure which will encourage and facilitate fair global settlements is especially critical in the mass tort area. Judge Rubin has eloquently described the problem, and has well articulated the important role a mandatory class can play in reaching a solution:

> The Bendectin litigation is but one example of massive product liability lawsuits involving large

numbers of plaintiffs, protracted trials and substantial litigation costs. The traditional court system is simply unequipped to handle such litigation in a conventional manner without materially depleting the judicial resources available for all other litigation. It is theoretically possible to assign sufficient judicial time to hear these cases promptly but only at the cost of further delay in an already overburdened system. The cost to the parties of litigating these cases under current procedures is such that few plaintiffs could afford the expense or the delay. Justice is not served by erecting tollgates at the courthouse door.

There is a solution. The resolution of disputes does not necessarily require trial. Within the judicial authority of this Court is a means whereby the parties might be assisted in reaching a prompt and equitable disposition of the entire problem. That solution involves a limited use of Rule 23 of the Federal Rules of Civil Procedure. A class certification would enable any proposed settlement to be presented to all class members and by them either accepted or rejected.

In re Bendectin Products Liability Litigation, 102 F.R.D. 239, 240 (S.D. Ohio), mandamus issued on other grounds, 749 F.2d 300 (6th Cir. 1984). See also Agent Orange, 100 F.R.D. at 723

(emphasizing utility of a mandatory class action in generating a global settlement).

Clearly the interests of the parties, the Court, and the absent class members would be well served by a fair global settlement which could lift the potential burden of endless litigation from the Court and provide the class members with a reasonably expeditious, fair settlement. Class certification will facilitate that goal. However, a mandatory class would be especially valuable in that regard. Without a mandatory class, a relatively small number of opt-outs asserting punitive damage claims can effectively prevent the implementation of a fair settlement by holding out for an extortionist share of an offer which is viewed as a reasonable global amount by most other litigants. The practical reality of the situation has been aptly described in Rosenberg, Of End Games and Openings in Mass Tort Cases: Lessons From a Special Master, 69 Boston Univ. L. Rev. 695 (1989):

> Moreover, because information generated by discovery in test trials is a public good, attorneys may choose not to participate in the informal joint arrangement, preferring instead to wait for another party to excavate this information. These hold-outs are thus in a position to extract payments above the average established by the pattern, and delay a final, comprehensive settlement. Mandatory class actions, though, would eliminate the hold out incentive.

> Mandatory class actions also conserve defendant assets for equitable distribution to every deserving victim.

Id. at 716. (emphasis added).

Alternatively, with a mandatory class, the would be opt-outs would lose their ability to hold a proposed settlement hostage to their own self-interest, because the Court can approve a proposed settlement and bind them over their objection. Once the potential for opt-outs is eliminated, a framework can be established under which counsel for the class representatives would be authorized to enter into settlement discussions with defendants on behalf of the entire class.

The personnel for such an organization are already represented on Plaintiffs' Coordinating Committee. A procedure for settlement discussions and proposing settlements to the Court should be discussed among Plaintiffs' Coordinating Committee for submission to the Court. Those representatives of the mandatory punitive damage class can attempt to work out a procedure through which settlement proposals, if agreed upon by a specified percentage of the group, would be presented to the Court as a recommended settlement. If such a procedure cannot be agreed upon, the Court can consider which of the varying proposals are appropriate.

The advantage of such a procedure is that it provides the defendants with representatives who are in a position to negotiate a global punitive damage settlement on behalf of the class. Absent a mandatory class -- which provides the framework for cooperation among all the plaintiff groups by

eliminating any prospect of opt-out -- all parties will pursue their own interests in a self-serving manner. This would make it far more difficult to achieve a global settlement which would end, once and for all, this massive burden of litigation.

(b) There Is No Infringement On Federal Court Jurisdiction

Parties opposing the certification also err in contending that a mandatory class would improperly infringe upon the federal court's jurisdiction over punitive damage claims which have been filed in that Court. Plaintiffs are aware of authority that state courts may not bar litigants from filing and prosecuting in personam actions in the federal courts. E.g., General Atomic Co. v. Felter, 434 U.S. 12 (1977). However, plaintiffs do not seek such an injunction.

Rather, plaintiffs seek an order pursuant to which an ultimate judgment in the class action, through trial or settlement, will be binding on all class members without any right of opt-out. Plaintiffs will not attempt to prevent any federal court litigants from proceeding with discovery that relates to punitive damages, subject to the terms of the coordinated discovery program that presently exists. Nor, assuming a federal court litigant won a "race" to judgment, would plaintiffs take the position that such a judgment was a nullity because of the pendency of the mandatory class action. It is highly unlikely, however, that such an eventuality can occur, given the thoughtful coordination which is occurring between the two Courts.

As shown in plaintiffs' reply memorandum in support of Rule 23(b)(3) certification, the federal court is empowered to stay its own proceedings in order to avoid piecemeal litigation, and in the interests of comity. Plaintiffs anticipate that at the close of discovery intelligent choices will be made by both Courts in their determinations as to how the cases will proceed to trial. Should the parties enter into meaningful global settlement negotiations, the existence of a mandatory punitive damage class in the state court action would facilitate the overall resolution of both the federal court and the state court claims without the need for the federal court to consider any stay request.

(c) Punitive Damages Are Designed To Punish Defendants And Protect Society, Not To Protect The Interests Of Individual Plaintiffs; Consequently The Class Members Have No Strong Interest In Preserving Individual Control Of Their Punitive Damage Claims -- While Justice Compels A Fair Allocation of Such Recoveries

"The law exacts punitive damages to deter and punish culpable defendants." Note, Class Actions for Punitive Damages, 81 Mich. L. Rev. 1787, 1789 (1983). Contrary to the position of the parties opposed to certification, no individual plaintiff is automatically entitled to receive punitive damages even if he has been injured and suffered a loss from defendant's wanton, malicious conduct.* See Portwood v. Copper

*Because punitive damages are not designed to protect the individual plaintiffs, they should not be heard to complain about certification of a mandatory punitive damages class.
(footnote continued on next page)

Valley Electric Asso., 785 P.2d 541, 542 (Alaska 1990) (punitive damages are to punish and deter defendants, not to compensate victims). See also In re School Asbestos Litigation, 789 F.2d 996, 1003 (3d Cir.), cert. denied sub nom., Celotex Corp. v. School District, 479 U.S. 852 (1986) ("the majority of states endorse exemplary damages for punishment and deterrence punitive damages form no part of the compensatory award"); Hanlon v. Johns-Manville Sales Corp., 599 F. Supp. 376, 381 (N.D. Iowa 1984); In re "Agent Orange" Products Liability Litigation, 100 F.R.D. at 728; Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46 (Alaska 1979), cert. denied, 454 U.S. 894 (1981); McDermott v. Kansas Public Serv. Co., 238 Kan. 462, 712 P.2d 1199, 1201 (1986).

Since the purpose of punitive damages is to protect society rather than to compensate the individual plaintiff, the Court should accord little weight to the supposed interest of individuals in asserting their own claims for punitive damages at the risk of substantially impairing the right of other class members to an equitable share of the aggregate punitive damage

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(footnote continued)

Note, 81 Mich. L. Rev. at 1808 n.111 (a court certifying a class action is not required to consider the plaintiffs' contentions that their individual interests in having control of the litigation precludes certification). See also Putz & Astiz, Punitive Damage Claims of Class Members Who Opt Out: Should They Survive? 16 Univ. S.F. L. Rev. 1, 33. (1981) Rather, plaintiffs may only be heard to assert an interest in receiving an equitable distribution of any punitive damage award that is entered and only a mandatory punitive damages class can guarantee that equitable apportionment.

fund. See Rosenberg, supra, 69 Boston Univ. L.Rev. at 701-05. As stated by Rosenberg, "To seek separate action to gain the advantage of jury ignorance of the consequences of excessive generosity is sheer opportunism which the legal system should be encourage to preempt." Id. at 704.

(d) The Mandatory Punitive Damage Class Meets The Requirements of Alaska R. Civ. P. 23(a)

Before it certifies a mandatory punitive damage class, this Court must find that the threshold requirements of Alaska R. Civ. P. 23(a) are satisfied.* The parties opposing certification of this class cannot, and do not, dispute the numerosity of the class. Nor can the opponents of certification seriously argue that common issues of fact or law do not exist.** Instead, they hope to defeat certification of the mandatory punitive damage class by asserting that the named class representatives are atypical and inadequate. That hope is a false one.

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*Alaska R. Civ. P. 23(a) provides: (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

**While the defendants argue that the common issues of fact and law do not predominate over individual issues, that argument applies only to Rule 23(b)(3)'s unique predominance requirement. Indeed, because punitive damage actions pose common questions of fact going to the defendants' culpability, they are particularly well-suited for class-action treatment. See Note, Class Actions for Punitive Damages, 81 Mich. L. Rev. 1787, 1804 n.90 (1983).

The standards for typicality and adequacy are discussed in detail in class plaintiffs' reply memorandum in support of their motion for certification of a Rule 23(b)(3) class. Clearly, the typicality requirement is satisfied here, since the claims of the proposed representatives with respect to punitive damages are identical to the claims of all the class members. Those claims hinge entirely on the nature of defendants' conduct. Furthermore, while typicality does not require that the representative have the same personal characteristics or the identical damage as all the class members, we note that the proposed representatives, consisting of the members of the Plaintiffs' Coordinating Committee, reflect the entire spectrum of interests that have sued for punitive damages.

Similarly, as shown in the Rule 23(b)(3) reply brief, the proposed representatives are adequate. Any purported conflicts of interest among the various class members relate only to the ultimate allocation of damages. Any such potential future conflict, if it actually exists, does not impair adequacy since only those antagonisms which go to the "subject matter of the suit" will bar a class action. State v. Alex, 646 P.2d 203, 214 (Alaska 1982). It is the defendants' culpability which is the "subject matter" of the punitive damage claims. Each class member, and each class representative, shares an identical interest in maximizing the aggregate amount of punitive damages to be divided.

(e) The Mandatory Punitive Damage Class Satisfies The Requirements Of Rule 23(b)(1)(B)

(1) Separate Adjudications Will Be Dispositive Of, Or Will Substantially Impair The Interests Of Class Members

If a mandatory punitive damage class is not certified, there is a substantial probability that adjudication of individual punitive damage claims would be dispositive of subsequent plaintiffs' claims. Thus, Rule 23(b)(1)(B) certification is entirely appropriate.

Many cases recognize that a plaintiff's right to receive a proportionate share of punitive damages may be frustrated by the limited generosity of juries who are informed of the extent of prior punishment, or by judges who determine that any further punishment would be excessive. E.g., In re Diamond Shamrock Chem. Co., 725 F.2d at 862; Roginsky v. Richardson-Merrill, Inc., 378 F.2d 832, 838-42 (2d Cir. 1967); In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703 (E.D. Mich. 1985). This potential limitation poses a very real risk in this case because of the enormity of the harm caused by the defendants, the location of all cases under the control of judges in Alaska, and the large number of victims who are asserting claims.*

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*As one treatise has aptly noted, it is not the assets of defendants that places a limitation on future plaintiffs' ability to obtain punitive damages, it is the "very real possibility that subsequent plaintiffs will find themselves in litigation in which defendants will have been found . . . to have been sufficiently punished" that raises a substantial

(footnote continued on next page)

In Alaska, the total punishment likely to be received is a relevant factor in determining an appropriate punitive damage award. Sturm, Ruger & Co. v. Day, 596 P.2d 38, 48 n.17 (Alaska 1979).* Consequently, evidence concerning prior awards would be relevant to a later jury's assessment of a proper punitive damage figure, or even as to whether any punitive damages at all should be awarded.** See Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 387 (E.D. Pa. 1982), aff'd sub nom., Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481 (3d Cir. 1985); Hospital Auth. of Gwinnet County v. Jones, 259 Ga. 759, 386 S.E.2d 120 (1989); Tindall v. Konitz Contracting, Inc., 783 P.2d 1376 (Mont. 1989); McDermott v. Kansas Pub. Serv. Co., 238 Kan. 462, 712 P.2d 1199, 1202

(footnote continued)

possibility that early awards of punitive damages will impair the ability of future claimants to obtain punitive damages. Pope & Teeter, Multiple Punitive Damages Claims In Toxic Tort Cases, 295 PLI/LIT 183 at 8.

*Unlike the situation before the Ninth Circuit in Dalkon Shield, 693 F.2d at 851-52, separate punitive damage claims necessarily will affect later claims because Alaska requires the trial court to take prior awards into account in determining whether subsequent awards are excessive.

**Additionally, there is a risk that inconsistent jury awards would unfairly apportion punitive damages among the claimants -- some receiving small awards and others receiving whopping ones. "There would be no difficulty if each jury somehow magically agreed on how much the defendant should be 'punished' and with equal magic knew how many plaintiffs would sue, and awarded each plaintiff only a proportionate 'share' of the total punitives." Putz & Astiz, Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?, U.S.F. L. Rev. at 13. Obviously, in the absence of a mandatory punitive damages class, this is not the case.

(1986); Guy v. Commonwealth Life Ins. Co., 698 F. Supp. 1305, 1316 (N.D. Miss. 1988); Fischer v. Johns-Manville Corp., 103 N.J. 643, 512 A.2d 466, 480 (1986); Restatement (Second) of Torts § 908 comment(e).

In recognition of the foregoing, the Second Circuit held as follows in denying a petition for a writ of mandamus in Agent Orange:

> Because punitive damages are designed solely to punish rather than to compensate, courts adjudicating later individual claims would admit evidence as to the payment of punitive damages in prior cases. Since this might induce juries to reduce punitive awards to later claimants, [the District Court] found that an 'adjudication with respect to individual members . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudication.' . . . Given the large number of potential claimants . . . and given the fact that punitive damages ought in theory to be distributed among the individual plaintiffs on a basis other than date of trial, the argument against [the District Court's] ruling does not justify issuance of a writ of mandamus.

725 F.2d at 862.

Furthermore, the interests of the class members will be seriously impaired if punitive damages are awarded seriatim,

only to be reversed pursuant to a decision of the United States Supreme Court that the process by which the awards were reached violated the Due Process Clause of the Fourteenth Amendment. Five Justices on the Supreme Court have suggested that due process concerns limit the imposition of punitive damages in some circumstances. See Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 86-89 (1988).* In Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233, 1234 (D.N.J. 1989), the Court specifically held that "multiple awards of punitive damages for a single course of wrongful conduct violate the defendants' rights under the Due Process Clause of the Fourteenth Amendment." See also, Putz & Astiz, Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?, 16 U.S.F. L. Rev. 1, 29 ("[i]t seems self-evident that even in a civil action, a defendant has a right to be protected against double recoveries, not because they offend the 'double jeopardy' provision of the fifth amendment as such, but simply because overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process under the fifth amendment").

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*In Browning-Ferris, the Court declined to address due process constraints on punitive damages because the issue was not properly preserved on appeal. However, Justice Brennan, joined by Justice Marshall in a concurring opinion, stated that punitive damage awards may violate due process. Id. at 2923. Additionally, Justice O'Connor, joined by Justice Stevens, suggested that due process may limit punitive damages awards. In Bankers Life, Justice O'Connor, joined by Justice Scalia in a concurring opinion, made the same suggestion.

Defendants in this action have expressly stated "it would be constitutionally impermissible for [them] to be exposed to multiple punitive damages trials." Defendants' Opp. Brief at 94-95. Given the above authority, their position must be taken seriously. Due to the special circumstances here, such a result can be avoided. Were seriatim punitive damage verdicts in this litigation to be invalidated by a later ruling of the Supreme Court, it would be a setback of grotesque proportions.

Such considerations led Chief Judge Weinstein to certify a Rule 23(b)(1) mandatory punitive damages class in Agent Orange, 100 F.R.D. at 727-28. He did this despite his finding that the aggregate potential award would not exhaust defendants' assets. Id. at 727.

A mandatory punitive damages class was also certified, without any finding of a limited fund, in In re Asbestos School Litigation, 104 F.R.D. 422 (E.D. Pa. 1984) vacated sub nom., In re School Asbestos Litigation, (3d Cir.), cert. denied sub nom., Celotex Corp. v. School District, 479 U.S. 852 (1986). The court stated:

> It is apparent that there is a substantial possibility that early awards of punitive damages in individual cases will impair or impede the ability of future claimants to obtain punitive damages. The reality of such impairment has been recognized by commentators and courts. See Wright, The Successful

Use of the Class Action Device, 52 UMKC L. Rev. 141, 144-45 (1984); Seltzer, Mass Tort Punitive Damages, 52 Fordham L. Rev. 37, 61, 72-73 (1983); Note, Mass Accident Class Actions, 96 Harvard L. Rev. 1143, 1157 (1983); Mass Tort Class Actions, 98 F.R.D. at 333 (1983); Restatement (Second) of Torts, § 908, comment e, at 467 (1976). See also Acosta v. Honda Motor Co., Ltd., 717 F.2d 828, 838 (3d Cir. 1983); Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 839; Agent Orange, 100 F.R.D. at 725; In re Related Asbestos Cases, 566 F. Supp. 818, 822 (N.D. Ca. 1983); Rosener v. Sears Roebuck & Co., 110 Cal. App.3d 740, 758-59, 168 Cal. Rptr. 237 (1980).

104 F.R.D. at 437. On appeal, that certification was vacated, essentially on the ground that the mandatory class was under-inclusive and therefore could not serve its intended purpose. In re School Asbestos Litigation, 789 F.2d at 1002-08. However, the Court of Appeals expressly stated that "we hold open the possibility of a 23(b)(1) punitive damage class in more appropriate circumstances." Id. at 1008. See also Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37, 63 (1983); Pope & Teeter, Multiple Punitive Damage Claims in Toxic Tort Cases, 295 PLI/LIT 183 at 5 (Nov. 1, 1985) ("the class action approach has substantial advantages in avoiding the overkill problem, as, theoretically the

defendants' entire liability for punitive damages would be determined in a single action, to be apportioned among all claimants.").

(2) Certification of a Mandatory Punitive Damages Class Would Protect Society's Interest In The Fair And Efficient Resolution Of Multiple Punitive Damages Claims

A single, class-wide adjudication of the punitive damage claim is best calculated to effect the twin social goals of deterrence and punishment, while avoiding wasteful relitigation and prejudice to subsequent plaintiffs. In Alaska the principal factors which are relevant to punitive damages are "the magnitude and flagrancy of the offense, the importance of the policy violated, and the wealth of the defendant." Ben Lomond, Inc. v. Campbell, 691 P.2d 1042, 1048 (Alaska 1984).* The magnitude and flagrancy of the defendants' offense, including the aggregate impact of the injury they created,

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*Opponents to certification of a mandatory class argue that this Court cannot certify a mandatory punitive damages class, because, under Alaska law, an award of punitive damages must bear a "reasonable relationship" to the amount of actual damages. Alaskan courts, however, also consider other, more significant factors in assessing punitive damages:

> Of more importance in determining whether the award is excessive [than the ratio of punitive to actual damages] are the factors listed in Sturm, Ruger: "The magnitude and flagrancy of the offense, the importance of the policy violated and the wealth of the defendant."

Ben Lomond, Inc. v. Campbell, 691 P.2d 1042, 1048 (Alaska 1984) quoting Clary Ins. Agency v. Doyle, 620 F.2d 194, 205 (Alaska 1980). Moreover, the reasonable relationship factor can be accommodated since class plaintiffs believe that damages can be proved on a classwide basis. See class plaintiffs' Reply Memorandum in support of certification under Rule 23(b)(3), Section II(C).

should not be measured in a succession of individual lawsuits in which each jury will consider evidence of total impact but award damages to only a single plaintiff.

If a mandatory punitive damages class is not certified, there will be repetition of trials involving the same issues and the same defendants, which will severely burden the Alaska court system. It is for just this reason that "public policy opposes multiple suits." Note, Class Actions for Punitive Damages, 81 Mich. L. Rev. 1787, 1809-10 (1983). A Rule 23(b)(1)(B) class would avoid this problem and would promote judicial economy by resolving the punitive damages issues in a single action. See In Re A.H. Robins Co., Inc., 880 F.2d at 733; Forde, Punitive Damages in Mass Tort Cases: Recovery on Behalf of a Class, 15 Loy. U. Chi. L.J. 397, 447 (1984) (certification of a (b)(1)(B) class action advances the practical objectives of judicial economy).

The parties objecting to a mandatory class certification contend that a time consuming and wasteful duplication of trials can be avoided, without class certification, through use of a consolidated trial, test case, or offensive collateral estoppel to determine the multiple of compensatory damages which should be awarded in punitive damages. This argument is addressed in plaintiffs' reply memorandum in support of Rule 23(b)(3) certification. As shown in that brief, those alternative techniques have failed to prevent duplication of trials, and it is wholly unrealistic to

think that sufficient consent could be obtained from the various parties to have a test case with binding effect. Furthermore, if those techniques were binding in later trials, they would have the effect of a mandatory class without the protections of adequacy of representation and judicial review to assure fairness which are afforded under Rule 23.

(f) The Argument That A Mandatory Punitive Damage Class Would Impair The Rights Of Class Members Is Without Merit

(1) Any Notice And Consent Requirements Are Satisfied

The opponents of class certification argue a mandatory class would be unconstitutional because plaintiffs would not receive pre-certification notice or an opportunity to exclude themselves. That argument has no basis in law.

Unlike Rule 23(b)(3) class actions, mandatory Rule 23(b)(1)(B) class actions, do not, and need not, afford plaintiffs the privilege of notice or exclusion. See Alaska Civil Rule 23(c)(2) (notice and opt-out privileges required only in Rule 23(b)(3) actions). The Advisory Committee Notes to Federal Rule 23(c)(2) make clear that the Supreme Court of the United States, in drafting this critical distinction between (b)(1) and (b)(3) actions, intended "to fulfill the requirements of due process." Advisory Committee Notes to Fed. R. Civ. P. 23(c)(2), 39 F.R.D. 69, 107 (1966). See also Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-74 (1974) (mandatory notice in 23(b) (3) actions, but not in 23(b)(1) actions intended as an "incorporation of due process standards").

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), does not require any different conclusion. First, Shutts addressed Rule 23(b)(3) class actions, not Rule 23(b)(1) or Rule 23(b)(2) actions. The Supreme Court expressly limited its holding to the action before it, intimating no view on other types of class actions. 472 U.S. at 812 n.3. As the District Court concluded in In re Jackson/Lockdown MCO Cases, 107 F.R.D. 703, 714 (E.D. Mich. 1985), upon review of footnote 3 in Shutts, "[t]his footnote reveals that the Supreme Court did not intend to bar every mandatory class action that did not offer the right of exclusion." The Supreme Court thus left unchanged the well-settled view that no privilege of exclusion exists for members of (b)(1) classes. See La Chapelle v. Owens-Illinois Inc., 513 F.2d 286, 288 (5th Cir. 1975); H. Newberg, 2 Newberg on Class Actions 2d § 8.17 at 130-31 (1985).

Even if, arguendo, a mandatory punitive damages class had to satisfy notice and opt-out requirements under Shutts, those requirements are fulfilled here. The issue in Shutts was whether class members who had not affirmatively chosen to bring suit in the forum state could nevertheless be subjected to a binding class action judgment in that state so long as they received notice of the pendency of the action and were given the opportunity to opt out. The Court held that consent to be bound by a judgment in the forum state was reflected in the class member's decision not to opt out, and that such consent satisfied due process requirements.

Here, the proposed class includes only persons who receive the Rule 23(b)(3) notice and do not opt out (therefore indicating their consent to the jurisdiction of a court in Alaska) and persons who bring suit in Alaska, regardless of whether or not they have opted out. As to this latter group, their decision to bring suit within the state manifests consent to have their claims determined within Alaska and constitutes sufficient activity within the state to satisfy any "minimum contacts" requirement of International Shoe Co. v. Washington, 326 U.S. 310 (1945) and its progeny.

Nor is there any requirement that the absent class members receive notice of the proposed mandatory punitive damages class before the Court can certify the class. The parties making that argument rely on In re Temple, 851 F.2d 1269 (11th Cir. 1988) and Dalkon Shield, 693 F.2d at 847. However, neither of those cases is applicable.

In Temple, notice was necessary because of the "non-adversarial nature of the proceedings below," which "almost certainly led to the premature and speculative finding that a limited fund existed." 851 F.2d at 1272.* Similarly, in Dalkon Shield, notice was required because the court certified a nationwide punitive damage class on its own motion, without giving out-of-state plaintiffs any opportunity to

---

*Furthermore, the order which resulted from that "non-adversarial" proceeding included an express injunction which stayed the actions of the petitioners, which actions were on the eve of trial.

participate in the briefing, in a context where thousands of claims had been brought in other jurisdictions. 693 F.2d at 857.

On their facts, Temple and Dalkon Shield merely hold that a court may not certify a mandatory class where the principal representatives of the interested parties are not before the Court. Here, there is no question that all significant interests are represented in the class certification proceedings. To the best of plaintiffs' knowledge, there are no relevant lawsuits pending in other jurisdictions. All adversarial viewpoints are fully expressed at the present time, and there is no need to notify the class prior to a decision on the motion.

Furthermore, plaintiffs propose that the Rule 23(b)(3) notice describe the certification of the mandatory class, and that the notice be provided to all reasonably identifiable litigants who bring suit in Alaska. Consequently, all class members will receive notice of the certification. In the event that they wish to contest that certification, there is nothing to stop them from seeking reconsideration.

(2) Punitive Damages Need Not Be Determined By The Same Jury That Decides Compensatory Damages

Parties opposing certification also argue that certification of a mandatory punitive damages class would require "unpermitted bifurcation" of the punitive damages from the issues of liability and compensatory damages. The argument is without merit. First, bifurcation need not occur. Rather,

the issues of liability, and of compensatory and punitive damages, could all be tried by the same jury.

Even assuming that separate juries decide the amount of global punitive damages and the amount of compensatory damages awarded to each plaintiff, there would be no impropriety. Such a structure was expressly approved in Jenkins v. Raymark Industries, Inc., 782 F.2d 468, 474 (5th Cir. 1986). The Fifth Circuit stated that punitive damages could be determined separately from actual damages because:

> The purpose of punitive damages is not to compensate the victim but to create a deterrence to the defendant . . . and to protect the public interest . . . . The focus is on the defendant's conduct, rather than on the plaintiff's. While no plaintiff may receive an award of punitive damages without proving that he suffered actual damages . . . the allocation need not be made concurrently with an evaluation of the defendant's conduct. The relative timing of these assessments is not critical.

Id.* (citations omitted)

---

*The opponents of certification contend that United Airlines v. Weiner, 286 F.2d 302 (9th Cir. 1962), holds that liability and damages cannot be tried separately. This ruling was "in effect, overrul[ed]" by a later opinion holding that it was proper to try damages to a jury separate from liability. See discussion in Petition of Gabel, 350 F. Supp. 624, 627 (C.D. Cal. 1972), citing United Airlines v. Weiner, 335 F.2d 379 (9th Cir. 1964).

(3) The Mandatory Class Does Not Improperly Impair the Class Members' Ability to Effectuate Private Settlements

Some plaintiffs have objected that a mandatory class will prevent them from settling their individual cases. However, certification will not have any practical impact on the class members' ability to achieve an individual settlement of their claims. Even if a class is not certified, defendants face numerous punitive damage claims having the potential for a large recovery. Consequently, the defendants are unlikely to settle any punitive damage claim outside the context of a global settlement, unless the settlement is an extremely cheap one. Insofar as class members desire to settle their compensatory damage claims, plaintiffs would not use the existence of a mandatory class as a ground for opposing any such settlement.

CONCLUSION

For the reasons given above, this Court should certify a mandatory punitive damage class pursuant to Alaska Rule of Civil Procedure 23(b)(1)(B).

DATE: March 26, 1990

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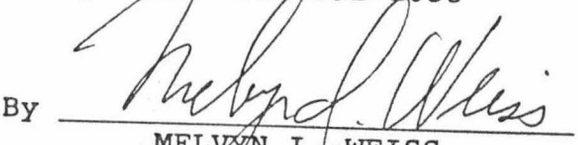
By 
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Honorable H. Russell Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re: the EXXON VALDEZ THIS DOCUMENT RELATES TO ALL CLASS ACTIONS	Case No. A89-095 Civil (Consolidated)

AFFIDAVIT OF MAILING

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

KIM LAMOUREUX, being first duly sworn, upon oath, deposes and says that she is employed in the offices of Davis Wright Tremaine, 550 West 7th Avenue, Suite 1450, Anchorage, Alaska 99501 and that service of:

SUPPLEMENTAL MEMORANDUM OF IDENTIFIED PLAINTIFFS REGARDING QUESTION 2 IN ORDER NO. 23 DATED MARCH 1, 1990

has been made upon all counsel of record based upon the Court's Master Service List of February 23, 1990, postage prepaid on this 27th day of March, 1990.

Kim Lamoureux
KIM LAMOUREUX

SUBSCRIBED AND SWORN TO before me this 27th day of March, 1990.

Debra D. Lopas
Notary Public in and for Alaska
My Commission Expires: 6/30/93

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Chairman, Ad Hoc Committee
on Class Certification

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	No. A89-095 Civil
the EXXON VALDEZ	(Consolidated)
This Documnt Relates to: ALL CASES	

CLASS PLAINTIFFS' (P1, P3, P8-P19, P21-P22, P24-P28, P40-P44, P46, P48, P50, P52, P54-P62, P64-P67, P73-P80, P95-P96, P112-P113, P116, P118, P120, P122, P124, P126, P128, P130, P132, P135-P147, P167-P168, P189, P195, P202-P206, P246-247, P267) MOTION FOR LEAVE TO FILE OVERLENGTH REPLY MEMORANDUM

Pursuant to General Rule 6(K)(1) of the Local Rules of the United States District Court for the District of Alaska, class plaintiffs in Case Nos. A89-095, A89-135, A89-136, A89-139, A89-144, A89-238 and A89-239 ("Class Plaintiffs")

The overlength memorandum is located in the folder behind Volume 52.

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respectfully move this Court for leave to file the attached consolidated reply memorandum addressing class certification issues which is in excess of twenty-five (25) pages.

As set forth in the accompanying memoradum, this motion is necessitated by plaintiffs' obligation to respond to seven separate memoranda opposing class certification which exceed 180 total pages. For the Court's convenience, class plaintiffs have consolidated their replies into one memorandum which addresses class certification issues under Rule 23(b)(2) and 23(b)(3).

DATE: March 26, 1990

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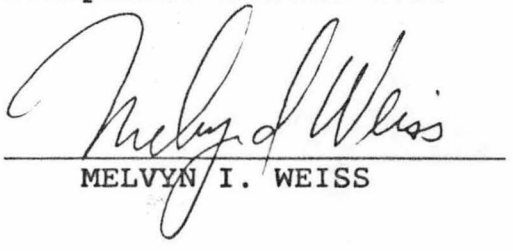
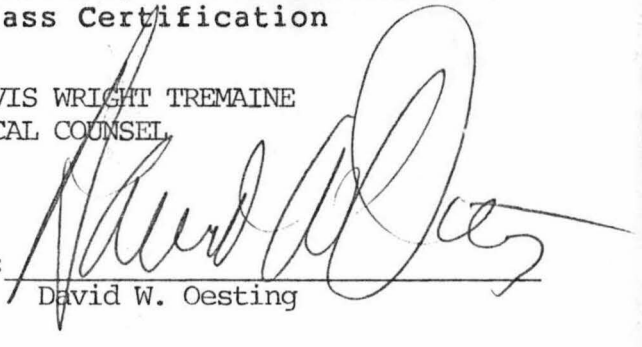


MELVYN I. WEISS

Chairman, Ad Hoc Committee on Class Certification

DAVIS WRIGHT TREMAINE
LOCAL COUNSEL



By: David W. Oesting

* * *

ORDER

IT IS SO ORDERED.

DATED: _____, 1990

_____
HONORABLE H. RUSSEL HOLLAND
UNITED STATES DISTRICT COURT JUDGE

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Chairman, Ad Hoc Committee
on Class Certification

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	No. A89-095 Civil
	)	
the EXXON VALDEZ	)	(Consolidated)
	)	
	)	
	)	
	)	
This Documnt Relates to:	)	
ALL CASES	)	
	)	

CLASS PLAINTIFFS' (P1, P3, P8-P19, P21-P22, P24-P28, P40-P44, P46, P48, P50, P52, P54-P62, P64-P67, P73-P80, P95-P96, P112-P113, P116, P118, P120, P122, P124, P126, P128, P130, P132, P135-P147, P167-P168, P189, P195, P202-P206, P246-247, P267) MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE OVERLENGTH REPLY MEMORANDUM

Class Plaintiffs have, pursuant to General Rule 6(K)(1) of the Local Rules of the United States District Court for the District of Alaska, moved this Court for leave to file the accompanying consolidated reply memorandum which exceeds

the twenty-five (25) page limitation set forth in General Rule 6(k).*

Class Plaintiffs believe that one consolidated memorandum addressing class certification under Rule 23(b)(2) and 23(b)(3) would assist the Court in organizing and analyzing the subject matter of the pending motions.

As expressly indicated therein, class plaintiffs' opening memoranda were necessarily general because it was impossible to anticipate the specific issues upon which defendants and other opposing parties would focus. See Consolidated Class Action Plaintiffs' Memorandum in Support of Motion for Class Certification dated September 22, 1989, at 3. Class Plaintiffs have attempted to be as concise as possible in their memorandum. However, defendants have filed a ninety-seven (97) page memorandum and other parties opposing class certification on various grounds have filed 6 separate memoranda totalling more than 80 pages. Moreover, defendants have made extensive reference to the factual record which was developed during class discovery. Further, in Order No. 23 this Court directed class plaintiffs to specifically address four issues in their reply memorandum and invited all

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* General Rule 6(K)(1) provides, in pertinent part, as follows:

> Unless otherwise ordered by the court . . . in Civil Cases . . . reply briefs shall not exceed twenty-five (25) pages, exclusive of pages containing a table of contents, table of citations, and any addendum containing statutes, rules, regulations, etc.

parties opposing class certification to submit additional memoranda of up to 10 pages on these issues.

Accordingly, class plaintiffs respectfully request this Court to grant them leave to file the attached consolidated reply memorandum which exceeds the twenty-five (25) page limitation set forth in General Rule 6(K)(1).

DATE: March 26, 1990

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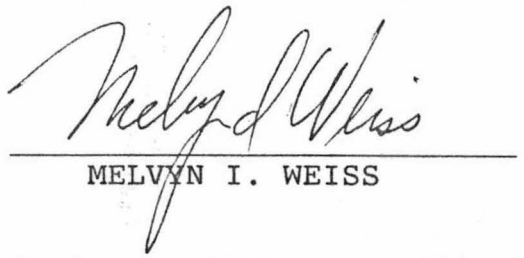

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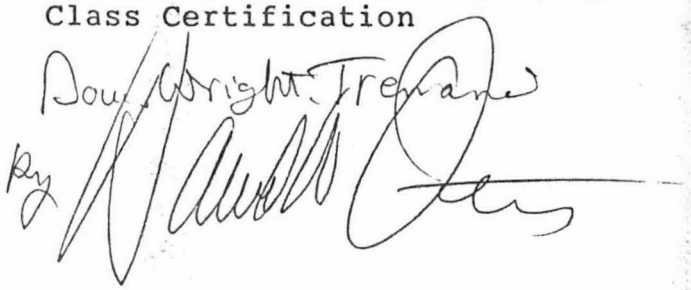
Chairman, Ad Hoc Committee on Class Certification



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Honorable H. Russell Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re: the EXXON VALDEZ	Case No. A89-095 Civil (Consolidated)
THIS DOCUMENT RELATES TO ALL CASES	

RE: A89-095, A89-135, A89-136, A89-139, A89-144, A89-238 AND A89-239

CLASS PLAINTIFFS' (P1, P3, P8-P19, P21-P22, P24-28, P40-P44, P46, P48, P50, P52, P54-P62, P64-P67, P73-P80, P95-P96, P112-P113, P116, P118, P120, P122, P124, P126, P128, P130, P132, P135-P147, P167-P168, P189, P195, P202-P206, P246-P247 AND P267)
REQUEST FOR ORAL ARGUMENT ON CLASS ACTION PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Class Action Plaintiffs hereby request oral argument on Class Action Plaintiffs' Motion for Class Certification with respect to which the final briefs have been filed with the Court on March 26, 1990. By this request, Melvin I. Weiss, Chairman of the ad hoc committee for class action issues, and the undersigned

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counsel certify that they believe oral argument is necessary. If oral argument is scheduled before May 8, 1990, Mr. Melvin I. Weiss respectfully requests that he be afforded an opportunity to confer with the Court with respect to such scheduling as he is unavailable from April 27 through May 7, 1990 and must coordinate numerous other matters prior to April 27, 1990.

Respectfully submitted,

DAVIS WRIGHT TREMAINE

By: _____
David W. Oesting

Melvin I. Weiss of
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Honorable H. Russell Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re: the EXXON VALDEZ	Case No. A89-095 Civil (Consolidated)
THIS DOCUMENT RELATES TO ALL CLASS ACTIONS	

AFFIDAVIT OF MAILING

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

KIM LAMOUREUX, being first duly sworn, upon oath, deposes and says that she is employed in the offices of Davis Wright Tremaine, 550 West 7th Avenue, Suite 1450, Anchorage, Alaska 99501 and that service of:

CLASS PLAINTIFFS' REQUEST FOR ORAL ARGUMENT ON CLASS ACTION PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

has been made upon all counsel of record based upon the Court's Master Service List of February 23, 1990, postage prepaid on this 28th day of March, 1990.

Kim Lamoureux
KIM LAMOUREUX

SUBSCRIBED AND SWORN TO before me this 28th day of March, 1990.

Debra Perras
Notary Public in and for Alaska
My Commission Expires: 4/3/93

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Honorable H. Russel Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re EXXON VALDEZ OIL SPILL LITIGATION	No. A89-095 Civil (Consolidated)
THIS DOCUMENT RELATES TO ACTION NO: A89-095, A89-117, A89-118, A89-140, A89-149, A89-238, A89-264, A89-446, A89-173	

SUPPLEMENTAL MEMORANDUM ON BEHALF OF TENDER PLAINTIFFS IN OPPOSITION TO ALYESKA DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Plaintiffs Keith H. Gordaoff, George A. Gordaoff (the "Gordaoffs"), and Hunter Cranz ("Cranz") submit this Supplemental Memorandum in opposition to the motion of the Alyeska defendants for judgment on the pleadings. [1] Although the motion is not specifically directed to the Gordaoffs or Cranz, it is directed to other operators of tender vessels. See Def. Br. at 8. Thus, whatever the Court ultimately decides concerning the arguments raised by the Alyeska defendants against tenders, the Gordaoffs and Cranz will likely be affected and therefore should be given an opportunity to be heard at this time.

The Alyeska defendants have moved for judgment on the pleadings with respect to all groups of plaintiffs except commercial fishermen. In brief, the Alyeska defendants argue that maritime law supersedes all other possible remedies – state and federal – and that under maritime law, no categories of plaintiffs other than commercial fisherman can recover for "economic harm" without also showing accompanying physical injury to person or property. The Gordaoffs and Cranz do not accept the arguments raised by the Alyeska defendants and adopt the counter-arguments set forth in the Joint Memorandum on behalf of all plaintiffs.

---

[1] The "Alyeska defendants" are: Alyeska Pipeline Service Co., Amerada Hess Pipeline Corp., Arco Pipe Line Co., BP Pipelines (Alaska), Inc., Mobil Alaska Pipeline Co., Phillips Alaska Pipeline Corp., Unocal Pipeline Co. and George M. Nelson.

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The Gordaoffs and Cranz submit this Supplemental Memorandum to bring to the Court's attention additional arguments applicable specifically to tenders. As demonstrated below, even if the Court accepts the defendants' arguments that their restrictive view of maritime law supersedes all other available remedies, tendermen are nevertheless entitled to recover for "pure economic harm" because they are "seamen" and "commercial fishermen" who fall within the well-recognized exception to the Robins Dry Dock [2] rule of limited recovery – an exception which the Alyeska defendants acknowledge. Def. Br. 9n.6; 23-24.

In addition, to the extent there is a dispute as to whether tendermen are commercial fishermen (or sufficiently identical to fishermen to come within the recognized exception), a factual question is raised which cannot be decided on this motion. (Plaintiffs agree with the Alyeska defendants that it would be inappropriate at this stage to convert the motion to one for summary judgment. See Def. Br. at 4n.3.) Although the Alyeska defendants have included tenders within the sweep of their motion, no reason is offered as to why tenders – who are professional seamen – should be lumped together with the diverse groups of other plaintiffs (taxidermists, kayakers, recreational fishermen, canneries,

[2] Robins Dry Dock v. Flint, 275 U.S. 134, 48 S.Ct. 134, 72 L.Ed. 290 (1927).

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etc.) against whom defendants seek judgment on the pleadings. As discussed below, there are many similarities in fact and in law between tendermen and commercial fishermen. Given these obvious similarities, the courthouse doors cannot be closed to tendermen merely on defendants' unsupported ipse dixit. At a minimum, full development of the factual record is necessary before the Court can determine whether these seamen fit within the exception which defendants themselves recognize.

A. Maritime Law Has Created A Special Exception for Seamen Such as Commercial Fishermen and Tendermen

The Alyeska defendants concede, as they must, that commercial fishermen are "the special 'favorites of admiralty.'" See Def. Br. at 9n.6; 23-24. Indeed, the Ninth Circuit, in Union Oil Company v. Oppen, 501 F.2d 558, 567 (9th Cir. 1974) (which arose out of a spill from an oil drilling platform off the coast of Santa Barbara, California), stated it more broadly: "seamen" – not just commercial fishermen – "are the favorites of admiralty and their economic interests [are] entitled to the fullest possible legal protection" quoting, Cargone v. Ursich, The Del Rio, 209 F.2d 178, 182 (9th Cir. 1953). Accordingly, commercial fishermen and other seamen are permitted to recover damages resulting from an oil spill (or other negligence), even if the damages are only for "economic harm" unaccompanied by any physical injury to person

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or property. Oppen, 501 F.2d at 568. Accord, State of Louisiana ex rel. Guste v. M/V Testbank, 524 F.Supp. 1170, 1173 (E.D. La. 1981), aff'd, 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986) (fishermen entitled to recover economic damages caused by a chemical spill in the Mississippi River Gulf outlet); Burgess v. M/V Tamano, 370 F.Supp. 247 (D.Me. 1973), aff'd without opinion, 559 F.2d 1200 (1st Cir. 1977) (fishermen and clammers entitled to recover damages caused by an oil spill from a grounded tanker in Casco Bay, Maine); see also, Emerson G.M. Diesel, Inc. v. Alaskan Enterprise, 732 F.2d 1468, 1472 (9th Cir. 1984) (fishermen entitled to recover lost profits caused by negligent manufacture of engine components on a fishing vessel); Jones v. Bender Welding & Machine Works, Inc., 581 F.2d 1331, 1337 (9th Cir. 1978) (same). In apparent acknowledgement of these cases (and many others), defendants have not directed their motion against commercial fishermen. See Def. Br. at 23-24. But defendants have, surprisingly, included tendermen among the targets of their motion.

Tendermen, however, are professional seamen and thus, even under the most restrictive view of maritime law urged by defendants, "their economic interests [are] entitled to the fullest possible legal protection." Oppen, 501 F.2d at 567. Tenders are an integral part of the fishing process in Alaskan waters, which has evolved into a two-step operation. The fishermen themselves (those who actually catch

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the fish and haul them out of the water) often remain out on the water at the fishing areas for days at a time. The tenders are necessary to transport the catch back to shore for processing and to bring needed supplies out to the fishermen. Without the tenders, fishing operations off the State of Alaska would have to be drastically reorganized and catches would be greatly diminished because fishermen would be required to leave the fishing areas and return to shore each time their holds were full.

As individuals who ply their trade on the high seas, tendermen brave the same dangers and other risks as commercial fishermen and all other professional seamen. Like fishermen, they are at the mercy of the weather and other natural disasters, not to mention man-made disasters such as the oil spill in question here. Like fishermen, their livelihoods directly depend upon the bounty of the sea.

The law of the State of Alaska also recognizes the functional similarities between fishermen and tendermen. For example, each crew member of a tender vessel is required by statute to hold a valid commercial fishing license, the very same license held by commercial fishermen. A.S. 16.05.480. In addition, "as a condition to the delivery or landing of fish," a tender vessel itself must hold and properly exhibit a commercial vessel license, the same license which commercial fishing vessels must hold. A.S. 16.05.490; 20 A.A.C. 05.130. Finally, tender vessels are subject to the same inspections

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for cleanliness and use of proper storage facilities as fishing vessels.

In Oppen, the Ninth Circuit examined both California tort law and maritime law to determine whether commercial fishermen (the only plaintiffs in that case) would be permitted to recover for "pure economic loss." The Court held that whether California or maritime law was applied, such recovery was permitted. The Oppen Court went on to explain:

> The plaintiffs in the present action [commercial fishermen] lawfully and directly make use of the sea, viz. its fish, in the ordinary course of their business. This type of use is entitled to protection from negligent conduct by the defendants in their drilling operations. Both the plaintiffs and the defendants conduct their business operations away from land and in, on or under the sea. Both must carry on their respective enterprises in a reasonably prudent manner. Neither should be permitted to inflict commercial injury on the other.

501 F.2d at 570-71. Under any definition, tendermen "lawfully and directly make use of the sea . . . in the ordinary course of their business." Additionally, they "conduct their business operations away from land and on . . . the sea." Accordingly, tenders readily fit within the Oppen holding which the Alyeska defendants themselves urge upon this Court.

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In Burgess v. M/V Tamano, – another case relied upon by defendants – the Court reached the same conclusion. In that case – decided strictly under maritime law – the Court held that fishermen and clam diggers could recover lost profits caused by an oil spill from a grounded tanker. The Court distinguished the special interests of the fishermen and clam diggers in the affected waters from the interests of the public at large:

> It would be an incongruous result for the Court to say that a man engaged in commercial fishing or clamming, and dependent thereon for his livelihood, who may have had his business destroyed by the tortious act of another, should be denied any right to recover for his pecuniary loss on the ground that his injury is no different in kind from that sustained by the general public.

370 F.Supp. at 250 (citing numerous other authorities) Tendermen also fit squarely within this analysis. Certainly, it cannot be said that the interests of the tendermen do not differ from the "general public" when it comes to pollution-free fishing areas.

In short, under the rationale of both Oppen and Burgess tendermen are plainly entitled to recover – under maritime law or otherwise – lost profits from defendants without any showing of accompanying physical injury to person or property.

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B. Defendants' Motion Requires the Resolution of Certain Factual Issues Which Cannot Be Decided Against Tendermen on the Existing Record

Before defendants' motion can be granted as to tendermen, it would be necessary to find, as a factual matter, that tendermen are not "seamen" or "commercial fishermen," and thus do not fall within the acknowledged exception to the Robins Dry Dock rule. As discussed above, tendermen are plainly "seamen," and there are many similarities in fact and law between tendermen and "commercial fishermen." Full development of the factual record will likely reveal other similarities as well. Defendants have offered no discussion at all (let alone reasoned analysis) as to why tendermen should be lumped together with the other diverse groups of plaintiffs against whom judgment on the pleadings is sought. Certainly, even a cursory analysis demonstrates that tendermen are more similar to commercial fishermen than to the "boat charterers, taxidermists and fishing lodges" (the "area business" class; Def. Br. at 4), the "recreational fishermen and hunters, hunting and fishing guides, photographers [and] kayakers" (the "use and enjoyment" class; id. at 7), or the seafood canneries and processors (id. at 8) against whom the motion is otherwise directed. Before tendermen can be denied their day in court, they must be given an opportunity to properly develop the factual, as well as the legal record.

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Under these circumstances, where issues of fact would have to be decided against the tendermen in order to grant the motion of the Alyeska defendants, that motion must be denied.

CONCLUSION

For the reasons set forth above (and in the Joint Memorandum on behalf of all plaintiffs), the Alyeska defendants' motion for judgment on the pleadings must be denied as to tenders.

Respectfully submitted this 26th day of March, 1990.

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IN THE UNITED STATES DISTRICT COURT

FOR THE STATE OF ALASKA

In re	)
	)
the EXXON VALDEZ	) No. A89-095 Civil
	) (Consolidated)

Re: A89-110; A89-099; A89-297; A89-109; A89-166; A89-102; A89-104; A89-265; A89-299; A89-111; A89-126 A89-129; A89-141; A89-096; A89-103; A89-107; A89-125 A89-108; A89-173; A89-095; A89-165; A89-135; A89-136; A89-139; A89-144; A89-238; A89-239; and A89-138

ERRATA TO NATIVE CORPORATIONS' (P-81 THROUGH P-94) MEMORANDUM PURSUANT TO PRE-TRIAL ORDER 23 RELATING TO CLASS CERTIFICATION ISSUES

Plaintiffs Chugach Alaska Corporation and the village corporations of Eyak, Tatitlek, Chenega, Port Graham and English Bay (the "Native Corporations") submit this pleading to correct erroneous factual statements made in the Memorandum Pursuant to Pre-trial Order 23 Relating to Class Certification Issues filed on March 26, 1990. The Native Corporations had argued that one of the proposed representatives of the Class Action Plaintiffs property owner's class, Old Harbor Native Corporation, was in the process of attempting to exchange the land it holds in the area affected by the oil spill for land in the Alaska National Wildlife Reserve, and therefore might not be an adequate class representative or have standing to assert a claim at all. The

Native Corporations are now informed and believe the assertions regarding the ANWAR land exchange are not correct, and therefore withdraw any argument that such land exchange would affect Old Harbor's adequacy as a class representative or standing.

Attached hereto are corrected pages 6 and 7 which should be substituted into Plaintiffs' Native Corporations Memorandum pursuant to Pretrial Order 23 relating to Class Certification Issues.

Dated this 13 day of April, 1990.

Attorneys for Plaintiffs:

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A. The Native Corporations' Claims Are Not Typical of Ordinary Fee-Simple Property Owners and Therefore Should Not Be Included in Such Class.

As correctly noted in Class Action Plaintiffs' Memorandum in Support of Motion for Class Certification ("Class Memorandum"), a class representative must meet all of the requirements of Rule 23 (a)(1)-(4) to be entitled to class certification. Specifically, the Court must find that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims and defenses of the representative parties are typical of the claims and defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

The Class Action Plaintiffs have amply demonstrated the fulfillment of these requirements for the vast numbers of fee-simple private property owners who were injured by the Exxon Valdez incident. See Class Memorandum at 27-39. However, the typicality and adequacy of representation requirements have not been met with respect to the claims of the Native Corporations, despite the fact that one of the proposed representatives of the Property Owners Class is a Native corporation.

Further, as alleged in their complaint, the Native Corporations herein are by far the largest group of private landowners in Prince William sound. In total, the Native Corporations own one million acres in the area impacted by the spill. Indeed, defendants have conceded that these Native

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corporations have "suffered by far the greatest oiling of Native landholdings." Defendants' Memorandum in Opposition to the Motion of Certain Plaintiffs for Class Certification at p. 65. Clearly, the substantial interests of these Native Corporations are not adequately represented by the proposed representative.[1]

Because of the important due process considerations involved, see Hansberry v. Lee, 311 U.S. 32 (1940), putative class members who possess special claims, such as the Native Corporations here, are properly excluded from the class. See, e.g., Forsberg v. Pacific Northwest Bell Telephone Co., 623 F. Supp. 117, 125 (D. Or. 1985) (court excluded individuals' claims of coercion from class where representative only alleged coercion of union; class limited to class members' claims of coercion of union), aff'd, 840 F.2d

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[1] Further, these deficiencies would not be resolved by the creation of a subclass with a proper representative. A subclass of the Native corporations would not satisfy the numerosity requirements of Rule 23(a)(1) because of the small number of Native corporations in the affected area.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	Case No. A89-095 Civil (Consolidated)
	AFFIDAVIT OF SERVICE BY MAIL

Vera C. Gehring, an employee of Birch, Horton, Bittner & Cherot, 1127 West Seventh Avenue, Anchorage, Alaska, being duly sworn states that on April 13, 1990, service of Errata to Native Corporations' (P-81 through P-94) Memorandum Pursuant to Pre-Trial Order 23 Relating to Class Certification Issues has been made upon all counsel of record based upon the Court's most recent service list of February 23, 1990, by placing a true and correct copy of same into the U.S. Mail with proper postage thereon.

Dated: 4/13/90

By: Vera C. Gehring
Vera C. Gehring

Subscribed and sworn to before me this 13 day of April, 1990.

Deborah Smith
Notary Public in and for Alaska
My Commission Expires: 8-26-92

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